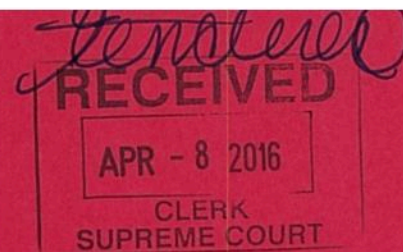


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2015-SC-000158-D
(2013-CA-002165)



WANDA JEAN THIELE AND
WANDA JEAN THIELE AS
EXECUTRIX OF THE ESTATE
OF HIRAM CAMPBELL, JR.

MOVANTS

VS

BRIEF FOR MOVANTS

KENTUCKY GROWERS
INSURANCE COMPANY

RESPONDENT

CERTIFICATE

The undersigned attorney hereby certifies that a copy of the record in this action was not removed from the Office of the Clerk of the Supreme Court of Kentucky and further that a copy of the brief on behalf of the Movants, Wanda Jean Thiele and Wanda Jean Thiele, Executrix of the Estate of Hiram Campbell, Jr. was served upon:

Don A. Pisacano
Miller, Griffin & Marks, P.S.C.
271 West Short Street, Suite 600
Lexington, Ky. 40507-1292

and that 10 copies were filed with the Clerk of The Supreme Court of Kentucky and a copy was mailed to the Clerk of the Court of Appeals and the Trial Court on this 8 day of April, 2016.

ROBERT R. BAKER
RANKIN & BAKER, PLLC
P.O. BOX 225
STANFORD, KY. 40484

INTRODUCTION

The issue before the Court is whether the definition of “collapse” as set out in *Niagara Fire Insurance Co. v Curtsinger*, 361 S.W. 2d 762 (Ky. 1962) the minority rule bars the claim of the Movant or is the majority modern/broad view rule as set out in *Couch On Insurance* 3rd, Sec. 153.891 the correct rule for collapse under the facts of this matter?

STATEMENT CONCERNING ORAL ARGUMENT

Movant requests oral argument and believes that oral argument would be helpful to the Court in deciding the issues concerning “collapse” as raised by both parties in this matter.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE.....	1-3
Couch on Insurance, 3rd Edition at Sec. 153:81.....	2
KY Court of Appeals Opinion, Kentucky Growers v Thiele.....	2
Niagara Fire Insurance Company v Curtsinger, 361 S.W. 2d 762 (KY. 1962).....	2
ARGUMENT; ISSUES AND QUESTIONS OF LAW PRESENTED.....	3-10
WAS THE TRIAL COURTS DETERMINATION THAT THE POLICY PROVIDED COVERAGE FOR DAMAGES RESULTING FROM HIDDEN INSECT OR VERMIN DAMAGE SUPPORTED BY THE EVIDENCE?	
Kentucky Growers Policy issued November 1, 2004.....	3-4
Kentucky Growers Policy issued January 20, 2011.....	4
IF KENTUCKY GROWERS POLICY PROVISIONS ARE AMBIGIOUS THE AMBIGUITIES MUST BE RESOLVED TO PROVIDE COVERAGE.....	5-7
St. Paul Fire and Marine Company v Powell Walton Milward, Inc., 870 S.W. 2d 223(1994).....	5-6
Grimes v Nationwide Mutual Fire Insurance Company 705 S.W. 2d 926 (1985).....	6
Eyler v Nationwide Mutual Fire Company 824 S.W. 2d 855(1992).....	6-7
THE TRIAL COURTS FINDING THAT KENTUCKY GROWERS POLICY PROVIDED COVERAGE FOR THE HIDDEN INSECT DAMAGE AND THAT THE RESIDENCE'S STRUCTURAL INTEGRITY WAS SUBSTANTIALLY IMPAIRED SO AS TO CONSTITUTE COLLAPSE WAS NOT ERRONEOUS.....	7-8
Couch on Insurance, 3rd Edition at Sec. 153:81.....	7
THIS COURT SHOULD DECLARE THAT THE DEFINITION OF COLLAPSE AS SET OUT IN NIAGARA FIRE INSURANCE CO. V CURTSINGER IS NO LONGER THE PROPER TEST FOR COLLAPSE.....	8-10

Assurance Co. Of America v Wall & Associates, LLC 379 F3rd 557.....	9
Whispering Creek Condominium Owner Association v Alaska National Insurance Co. 774 P2d 176, (1989).....	9
Jenkins v United States Fire Insurance Co. 347 P2d 417, (19569).....	9
Thornewell v Indiana Lumbermens Mutual Insurance Co. 147 N W 2d 317 (1967).....	9
Weiner v Selective Way Insurance Co. 793 A 2d 434.....	9
Niagara Fire Insurance Company v Curtsinger, 361 S.W. 2d 762 (KY. 1962).....	10
CONCLUSION.....	10-11

STATEMENT OF THE CASE

Kentucky Growers Insurance Company issued a policy of insurance covering the residence of Hiram Campbell, Jr. on November 1, 2004. (Copy Attached at Tab 1) The policy self-renewed each year. On January 3, 2011 Wanda Jean Thiele filed a claim with Kentucky Growers for damage due to hidden insect damage which had caused structural damage to the home resulting in the open and obvious process of collapse of the home. Kentucky Growers, denied coverage for the claim stating that Kentucky Growers Policy did not cover any damage caused by termites or other insect damage. Thereafter, Thiele had an attorney write to Kentucky Growers and point out the provisions of the policy which stated it provided coverage for hidden insect damage. After its corporate office reviewed the letter, Kentucky Growers again responded with a denial of coverage.

Thereafter, Kentucky Growers then issued an amendment to the coverage of the existing policy at the time of the pending claim on January 20, 2011. (Copy Attached at Tab 2) This amendment to the policy removed the coverage for damage from hidden insect, vermin or hidden decay as specifically set out in the policy in effect at the time of the claim.

Plaintiff filed an action in the Rockcastle Circuit Court December 29, 2011. Kentucky Growers answered and had Donan Engineering inspect the structure. After taking the deposition of the plaintiff, Thiele, Kentucky Growers filed a motion for a declaratory judgment seeking a finding by the Trial Court, as a matter of law, that no coverage existed for loss resulting from the hidden insect or vermin or hidden decay as set out in the policy.

Counsel for both parties argued the issue of coverage and the meaning of "collapse" and the Trial Court issued a declaratory judgment, finding that the policy of Kentucky Growers did provide coverage and that an actual collapse of the structure was not required as argued by Kentucky Growers. Kentucky Growers had submitted to the Trial Court with its motion the color photographs of the house in question taken by its agent Donan Engineering for review by the Trial Court to demonstrate its claim that the house had not fallen down. The Trial Court adopted the modern/broad view of "collapse" as discussed in Couch on Insurance 3rd Sec. 153:81 (Copy Attached at Tab 3) in regard to what constituted a collapse from claims involving hidden decay.

Prior to a trial on the issue of damages counsel for Thiele and Kentucky Growers exchanged the evidence to be presented on the issue of damages which was in excess of the policy limits, the parties agreed to enter the judgment for the damages caused by the hidden insect damage as there was no issue about the instability of the house as a result of the insect damage. The issue of the definition of "collapse" under the policy would be the only issue on appeal.

Kentucky Growers filed an appeal to the Kentucky Court of Appeals. The Appellate Court issued an opinion reversing the decision of the Rockcastle Circuit Court. (Copy Attached at Tab 4) The Court of Appeals based its decision of the decision of the former Court of Appeals, now the Supreme Court of Kentucky in the case of Niagara Fire Insurance Co. v Curtsinger, 361 S. W. 2d 762 (Ky. 1962) (Copy Attached at Tab 5) and stated the Trial Court had erred in not following the decision as set out in Niagara Fire Insurance Co. v Curtsinger, supra in regard to the meaning of "collapse".

The Appellate Court stated it was bound by the decision of the former Court of Appeals in Niagara Fire Ins. Co. v Curtsinger, supra. It is from this determination by the Court of Appeals that Thiele brings this this matter to the Kentucky Supreme Court for determination.

ISSUES AND QUESTIONS OF LAW PRESENTED

**WAS THE TRIAL COURTS DETERMINATION THAT
THE POLICY PROVIDED COVERAGE FOR
DAMAGES RESULTING FROM HIDDEN INSECT
OR VERMIN DAMAGE SUPPORTED BY THE EVIDENCE?**

It had been the position of Kentucky Growers that the policy of insurance under which the claim had been made did not provide for damages resulting from termite, hidden insect or vermin to the dwelling. The Trial Court after a review of the policy of insurance issued by Kentucky Growers to Hiram Campbell in 2004 under which the claim was made determined the policy did provide coverage. The policy issued November 1, 2004 (Copy Attached at Tab 1) under which the claim was filed. The policy states as follows at page 3 of the policy (R/A 9) under Coverage A - Residence as follows:

"We" cover the "residence" on the "insured premises" including built in components or fixtures, structures attached to the "residence, as well as building materials and supplies located on the "insured premises" for use in construction , alteration, or repair of the "residence"

The policy then goes on to set forth at page 5 (R/A10) as follows:

INCIDENTAL PROPERTY COVERAGES FOR A, B, C.

This policy provides the following Incidental Property Coverages. They are subject to all of the "terms" of the applicable Coverages A, B, or C.

No. 8 of the INCIDENTAL PROPERTY COVERAGES (R/A 10) states as follows:

8. Collapse- We pay for direct physical loss to property covered under Coverages A, B. and C involving the collapse of a building or a part of a building caused only by the following:
(b) hidden insect or vermin damage or hidden decay;

Kentucky Growers claimed not to provide coverage for hidden insect or vermin damage. Their motion for a Declaratory Judgment in April 2012 (R/A 25-27) at page 26 states that the policy contained the following exclusion. Kentucky Grower's policy states under "Exclusions":

7. BIRDS, vermin, rodents, insects or domestic animals-"We do not pay for loss caused by birds, vermin, rodents, insects or domestic animals.

This language is not a part of the policy of insurance in effect at the time the claim was made. (Tab 1) It is language contained in the policy (Copy Attached at Tab 2 at page 6) issued by Kentucky Growers on January 20, 2011.

Kentucky Growers has switched their position in that the November, 2004 policy did provide coverage for hidden insect or vermin or hidden decay under the Incidental Coverages of the policy as set out above, but now takes the position that there has been no collapse of the residence as they interpret the term "collapse" to only mean the whole residence must fall down. The policy does not define the term "collapse" nor does it require a complete collapse to provide coverage. (See policy language Incidental Property Coverages at # 8 as set out above) Kentucky Growers' policy clearly covered the "physical loss involving the collapse of a building or any part of a building (emphasis added) caused by hidden insect or vermin or hidden decay".

The Trial Court's finding that the November 2004 policy of Kentucky Growers provided coverage for the hidden vermin and insect damage claimed by Thiele is supported by the policy language referenced above.

**IF KENTUCKY GROWERS POLICY PROVISIONS
ARE AMBIGUOUS THE AMBIGUITIES MUST BE
RESOLVED TO PROVIDE COVERAGE**

Kentucky Growers policy (Tab 1) provides coverage for collapse under the Incidental Coverages at No.8, but does not define the term "collapse" in the definitions section of the policy or under No. 9 of the exclusions to the coverage's of A, B and C in the policy at page 7. Numeral 9 of the Exclusions to Coverage's A, B, and C on page 7 states:

9. Collapse - "we" do not pay for loss caused by collapse except as provided for under the Incidental Property Coverages.

Under Numeral Paragraph 8 at the top of page 6 of the policy it states;

Collapse does not mean settling, cracking, shrinking, bulging or expanding. This coverage does not increase the "limits" shown for the property covered.

There is a clear ambiguity in the policy in regard to what type of collapse is covered by the term "collapse" as used in the policy. The policy language states that there may be a collapse of "a part of a building" and does not limit coverage to a total "collapse" of the whole building.

The case law in Kentucky is quite clear that inconsistencies or ambiguities in a policy of insurance are to be construed in the light most favorable to the insured so as to make the insurance effective.

In the case of St. Paul Fire and Marine Company v Powell Walton Milward, Inc., 870 S.W. 2d 223(1994) at page 226 the Supreme Court of Kentucky in certifying an issue of law to the Sixth Circuit Court of Appeals discussed the dominance of coverage over an exclusion in a policy. The Court stated at page 226 as follows:

“..., There is, in such an instance a repugnancy between the two clauses, especially where one phrase expresses the chief object and purpose of the contract Thus,

where the provisions may conflict, the contract shall be resolved to afford maximum coverage.

At page 227 the Court said "Application of the exclusionary provision in the present context of this case would be contrary to the longstanding principle that such exclusion should be strictly construed to make insurance effective. State Auto Mut. Ins. Co. v Trautwein Ky. 414 S.W. 2d 587 (1967)

The Kentucky Court of Appeals in Grimes v Nationwide Mutual Fire Insurance Company 705 S.W. 2d 926 (1985) in reviewing the trial courts determination that no coverage existed reversed the trial court and instituted coverage and stated as follows at page 931.

...."There are two cardinal principles which apply to the construction of insurance contracts. "the contracts should be liberally construed and all doubts resolved in favor of the insured,...., and, more importantly to this case exceptions and exclusions should be strictly construed to make insurance effective,...

Here, Kentucky Growers does not contest the provisions of the policy coverage set forth above which grants coverage for physical loss to property caused by hidden insect, vermin or hidden decay. It only relies on the exclusion at Page 7 Numeral paragraph nine, (Tab A) which reads;

COLLAPSE "we" do not pay for loss caused by collapse,
except as provided under Incidental Property Coverages.

This exclusion is ambiguous. It makes no reference to collapse as a result of "hidden insect, or vermin damage or hidden decay" as provided at page 5 Numeral paragraph 8 of the Incidental Property Coverages.

Clearly, the original policy included coverage for hidden loss caused by hidden insect, vermin or hidden decay. Kentucky Growers was the drafter of said policy. The Supreme Court in Eyler v Nationwide Mutual Fire Company 824 S.W. 2d 855(1992) at page 859-860 stated:

"..., as to the manner of construction of insurance policies,

Kentucky law is crystal clear that exclusions are to be narrowly interpreted and all questions resolved in favor of the insured. ..., Exceptions are to be strictly construed so as to render the insurance effective.

And since the policy is drafted in all details by the insurance company, it must be held strictly accountable for the language used.”

**THE TRIAL COURTS FINDING THAT KENTUCKY
GROWERS POLICY PROVIDED COVERAGE
FOR THE HIDDEN INSECT DAMAGE AND THAT
THE RESIDENCE'S STRUCTURAL INTEGRITY
WAS SUBSTANTIALLY IMPAIRED SO AS TO
CONSTITUTE COLLAPSE WAS NOT ERRONEOUS**

The Trial Court correctly determined that as there were no Kentucky cases directly on point, but the majority rule in regard to collapse from hidden decay as set forth in Couch on Insurance, 3rd Edition at Sec. 153:81 (Tab 3) is that the structure need not be in imminent danger of collapse, but the damage to it must substantially impair the structural integrity of the building. That is the damage which alters the basic stability or structure of the building constitutes a "collapse".

The photographs taken by Donan Engineering when they inspected the house for Kentucky Growers which were presented to the Trial Court by Kentucky Growers clearly show the house to be in the process of a collapse and to have significant impairment of its structural integrity. (Copies of all photographs attached as Tab 6)

Photograph # 7 and 8 show the extensive insect damage to the wood framing of the walls.

Photographs # 11, 12 and 13 show the stove pipe from the stove in the floor to the chimney has pulled out as the floor is falling and the paneling and floor at the chimney has dropped.

Photographs 18, 19 and 20 demonstrate and show the collapse of the walls in the respective rooms.

Photograph # 20 shows the wall paneling moving away from the chimney in that room.

Photograph 21 shows a bulge at the bottom of the paneling on the west wall caused by the floor beams collapsing.

Photograph 24 demonstrates that the wall is collapsing as the chimney flue is stationary and the wall is clearly moving downward from the hidden insect damage.

Photographs 31, 32, 33, and 34 clearly demonstrate that the walls of that room are collapsing. There are bulges in the paneling of the east and west walls and the door on the west side of the room will not open due to the process of collapse. Only the garage which is concrete block as shown in photographs 35 and 36 does not show evidence of collapse. The dropping of the floors and their underpinning as shown in the various photographs clearly show that the structure of the house was severely impaired. The stove pipe (No. 11) has pulled out of the chimney where the floor supporting the stove is falling. Photograph 13 shows the floor at the chimney dropping and Photograph 24 clearly shows that the wall is falling and the chimney flue is stationary and the wall around clearly shows the collapse of the house.

These photographs clearly show the impaired structural integrity of the house upon which the Trial Court determined that a collapse covered by the terms of the policy had occurred and was a covered loss under the policy in question.

**THIS COURT SHOULD DECLARE THAT THE
DEFINITION OF COLLAPSE AS SET OUT IN
NIAGARA FIRE INSURANCE CO. V CURTSINGER
IS NO LONGER THE PROPER TEST FOR COLLAPSE**

The bottom line of this matter is whether the definition of “collapse” as set out in Niagara Fire Insurance Co. v Curtsinger, supra is still the method of determining if a

collapse has occurred or is the definition of “collapse” as set out in Couch on Insurance 3rd supra, and declared to be the proper test of collapse by other jurisdictions, the proper test for the Trial Courts and the member of the Kentucky Bar to use in the future?

The Ninth Circuit Court of Appeals in the case of Assurance Co. Of America v Wall & Associates, LLC 379 F3rd 557 determined that the Trial Courts interpretation that the insurance contract required a “sudden falling down” to be a collapse under the policy to be incorrect. The Court said at page 558:

...,We hold therefore, that the collapse provision here provides coverage not only for actual collapse, but for imminent collapse.

The policy language was the same as in the policy before the Court. At page, 559 the Court said the policy language was as follows: We will pay for loss or damage caused by or resulting from ,..., collapse of a building or any part of a building caused by (b) hidden decay. The policy also had the same language that “collapse” did not include settling, cracking, shrinkage, bulging or expansion.

The Supreme Court of Alaska in the case of Whispering Creek Condominium Owner Association v Alaska National Insurance Co. 774 P2d 176, (1989) came to the same conclusion that a collapse had occurred when the basic structure is materially impaired and is imminent danger of collapse. The opinion cited cases from other jurisdictions that had come to the same conclusion that an actual collapse was not required, but if the basic structure was materially impaired a collapse would be covered. See Jenkins v United States Fire Insurance Co. 347 P2d 417, (19569); Thornewell v Indiana Lumbermens Mutual Insurance Co. 147 N W 2d 317 (1967);

The Superior Court of Delaware in the case of Weiner v Selective Way Insurance Co. 793 A 2d 434 adopted the “Broad View” approach instead of the “traditional view”

which required and actual collapse. The Court in its opinion at pages 441-443 discussed “The Traditional View verses the Broad View of the meaning of collapse in property insurance contracts”. They cited various jurisdictions that had declared the “Broad View” which did not require an actual collapse to occur to be covered.

The facts of the case of Niagara Fire Insurance Co. v Curtsinger, supra are so limited that the decision of the Court in regard to the definition of “collapse” are not applicable to the case at bar. The Court at page 764-765 of the Niagara Fire opinion stated

“It seems to us that the that the mere subsidence of the floor of the porch, which pulled it and the roof away from the building a few inches, cannot be regarded as a collapse of any part of the building,...”

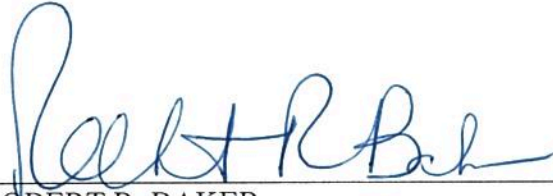
There was no evidence of “impaired structural integrity” or imminent collapse. The facts of this case especially as shown by the photographs presented by Kentucky Growers to the Trial Court clearly show the “structural integrity of the house to have been compromised”

The ruling of the Trial Court based upon the evidence presented by Kentucky Growers clearly supports the ruling that there had been a collapse as set out in Couch on Insurance 3rd the modern/broad view rule.

CONCLUSION

The movant, Thiele, respectfully submits that this Court should determine that the proper Definition of “collapse” is that set out in the “Broad View” rather than the “Traditional View” and issue an opinion reversing the decision of the Kentucky Court of

Appeals and affirming the decision of the Trial Court and its findings on the issue of collapse and direct the judgment in favor of Thiele be proper.

A handwritten signature in blue ink, appearing to read "Robert R. Baker", written over a horizontal line.

ROBERT R. BAKER
RANKIN & BAKER, PLLC
P.O. BOX 225
STANFORD, KY. 40484